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No. (1)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MILDRED LOUISE BLAS,
et. al.,
Petitioners

versus

Government of Guam,
et. al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

1. Whether Guam Should Be Viewed As A Federal Agency Or Instrumentality For All Purposes Or Not.

2. If Guam Is An Agency Or Instrumentality For Some Purposes Only, Should It Be Recognized As An Agency Or Instrumentality In Suits Involving Such Agencies Or Instrumentalities Under FRAP Rule 4(a)?

LIST OF ALL THE PARTIES TO THE PROCEEDING

The list of all the parties to the proceeding in the United States Court of Appeals for the Ninth Circuit appears as follows:

MILDRED LOUISE BLAS, As Personal Representative of the Estate of JOHN MARVIN BLAS, On Her Behalf and as Guardian for the Minor, MARVIN JOHN BORJA, Petitioner;

v.

Government of Guam, JOSE T. CHARFAUROS, Individually and as Director of the Department of Corrections; FREDERICK B. QUINENE, Individually and as Deputy Director of the Department of Corrections; VICENTE CASTRO, Individually and as Superintendent of the Department of Corrections, Government of Guam, Respondents.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit Case No. 90-16048 (For publication) filed July 31, 1991 is reported at 941 F.2d 778. The Order denying rehearing filed September 18, 1991 is not for publication.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on July 31, 1991. (Appendix A). Timely Petition for Rehearing was sent to the Clerk, Ninth Circuit via DHL Courier Service on July 20, 1991 (Appendix P). Ninth Circuit Rule 26-1 extends by seven (7) days all deadlines for filing set forth in the Federal Rules of Appellate procedure and Ninth Circuit Rules except as provided by court order, FRAP 26(b) and 31. (Appendix O). The opinion denying

the rehearing was filed on September 18, 1991 (Appendix B). The jurisdiction of this Court is involved under 28 U.S.C.S. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution
Article IV, Section 3, Clause 2:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory of other Property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or any particular state.

48 U.S.C.S. Sec. 1421a:

> **Unincorporated territory; capital; powers of government; suits against government; type of government; supervision**
>
> Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this Act shall have power to sue by such name, and with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government in all matters not the

program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of the Interior.

48 U.S.C.S. Sec. 1421 (Appendix C)

48 U.S.C.S. Sec. 1421i (Appendix D)

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42 U.S.C.S. Sec. 1301 (Appendix M)

42 U.S.C.S. Sec. 8802 (Appendix N)

Federal Rules of Procedure, Rule 4(a):

Rule 4. Appeal as of Right--When Taken.

(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court

> within 30 days after the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

STATEMENT OF THE CASE

On January 17, 1984, John Marvin Blas (hereafter "Decedent") was murdered while under confinement at Building "D" of the Adult Correctional Facility, Department of Corrections ("DOC"), Government of Guam. At the time of the murder, DOC Building "D" was used to house violent, repetitive and long-term hardened criminals. Decedent was a short-term petty offender incarcerated for a non-violent crime and had only a few months to serve before

being released. Both the Government of Guam and the Superior Court agreed that Decedent was not to be housed with the hardened criminals, rather Decedent should have been transferred to a safer environment. Despite this agreement, DOC maintained Decedent in the dangerous community because of alleged overcrowding in its facility normally used for petty offenders.

Pursuant to the Government Claims Act, Sections 6500 et. seq. of the Government Code of Guam, Blas filed a claim against the Government of Guam on May 25, 1984 which claim was denied by the Government on November 3, 1984.

On May 20, 1986, Blas filed a Complaint for Violation of Civil Rights in the District Court of Guam (Civil Case No. 86-0032) against the Government of Guam and individual defendants in their

official and individual capacities. The complaint was filed within the eighteen (18) month limitation period of Sec. 6500.05 of the said Claims Act. The complaint's second cause of action was for wrongful death.

On October 26, 1986, Blas filed another complaint in the Superior Court of Guam, CV No. 1103-86, for wrongful death against the same defendants based upon the same nucleus of operative facts.

On October 27, 1986, the District Court of Guam dismissed the civil rights case against the Government of Guam and other defendants in both their official and individual capacities. Blas appealed the dismissal to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit Court reversed and remanded the case to the District Court of Guam, directing reinstatement of the case only

against the individual defendants in their individual capacities; that case is still pending in the District Court of Guam awaiting the determination of the Superior Court action.

The writ of certiorari being sought from this Court arose out of the Superior Court case as hereinafter shown.

On January 26, 1989, the defendants in the Superior Court case filed their motion for Summary Judgment on the grounds that the statute of limitations barred Blas' claim. Blas disagreed, and asserted that since the District Court action was filed within the eighteen (18) month limitation period of the Government Claims Act, such filing in the District Court equitably tolled the filing in the Superior Court. On August 14, 1989, the Superior Court held that the doctrine of equitable tolling was inapplicable to

Blas' claim against the Government of Guam and that Blas' claim against individual defendants were barred by Guam's two (2) year statute of limitation for personal injury actions.

On September 12, 1989, Blas filed her notice of appeal to the District Court of Guam, Appellate Division, appealing the Superior Court's August 14, 1989 decision. Jurisdiction over the appeal was based on 48 U.S.C.S. Sec. 1424-3(a)(b). On May 17, 1990, the District Court entered an opinion affirming the Summary Judgment of the Superior Court. On July 16, 1990, Blas appealed the District Court's decision to the United States Court of Appeals for the Ninth Circuit. Jurisdiction over the appeal was based on 48 U.S.C.S. Sec. 1424-3(c) and Federal Rules of Civil Procedure (FRCP) Rule 4(a). In her opening brief on the merits, Blas

contends that the Government of Guam is an agency or instrumentality of the federal government, hence her appeal brought within the sixty (60) day time limit is timely under FRAP Rule 4(a). The government and individual defendants served their response brief on the merits contemporaneously with a Motion to Dismiss for Failure to File a Timely Notice of Appeal under FRAP Rule 4(a). The Motion to Dismiss was argued and submitted on May 7, 1991. On July 31, 1991, the Ninth Circuit dismissed the Appeal as untimely, concluding that Guam is not an agency of the federal government for purposes of the 60-day time limit on appeals in suits involving such agencies under Rule 4(a). (Appendix A). Blas filed a petition for rehearing which the Ninth Circuit denied on September 18, 1991. (Appendix B).

THE DECISION CREATES FEDERAL ISSUES

The Ninth Circuit decided that:

(1) Guam should be viewed as a federal instrumentality for some purposes.

(2) Guam is not a federal agency or instrumentality for the purposes of the 60-day time limit of FRAP Rule 4(a).

REASONS FOR GRANTING THE WRIT

Blas presents these federal questions:

I.

Whether Guam Should Be Viewed As A Federal Agency Or Instrumentality For All Purposes Or Not Should Be Settled By This Court.

II.

If Guam Is An Agency Or Instrumentality For Some Purposes Only, Should It Be Recognized As An Agency Or Instrumentality

In Suits Involving Such Agencies Or Instrumentalities Under FRAP Rule 4(a).

DISCUSSION

(I)

Whether Guam Should Be Viewed as a Federal Agency or Instrumentality For All Purposes?

The question presented above is of utmost importance to the Territory of Guam vis-a-vis its relation to the federal government of the United States.

> "Guam, an island of more than 200 square miles located in the West Central Pacific, became a United States possession at the conclusion of the Spanish-American war by the Treaty of Paris, Art. II, 30 Stat 1755. Except for the period from December 1941 to July 1944, when Japan invaded and occupied the island, the United States Navy administered Guam's affairs from 1898 to 1950, when the Organic Act was passed . . ." Ngiraingas v. Sanchez, 495 US _ _, 109 L Ed. 2d 163, 170, 110 S Ct 1737 (1990) See, A.

Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations 313, 323 (1989).

Guam is an unincorporated territory of the United States, 48 U.S.C. 1421a. In the United States, a "Territory" is not a distinct sovereignty and has no independent powers. It is a political community organized by Congress, all of whose powers are created by Congress and all of whose acts are subject to Congressional supervision. Talbott v. Silver Bow County, 139 U.S. 438, 11 S Ct. 594, 35 L Ed. 210 (1891). Indeed, this Court in United States v. Wheeler, 435 US 313, 55 L Ed. 2d 303, 98 S Ct 1079 (1978) citing to Domenech v. National City Bank, 294 U.S. 199, 204-205, 79 L Ed. 857, 55 S Ct 366 (1935) held:

> ". . .when a territorial government enacts and enforces criminal laws to govern its inhabitants, it is not acting as

> an independent political community like a State, but as an agency of the federal government. . ." 55 L Ed. 2d at 311.

Addressing the issue of Guam's status in relation to the federal government, the Ninth Circuit in the case of Sakamoto v. Duty Free Shoppers, Ltd. 764 F. 2d 1385 (9th Cir. 1985), Cert. den. 475 U.S. 1081, 106 S Ct. 1457. 89 L Ed. 2d 715 (1986) held that "since Guam is an unincorporated territory enjoying only such powers as may be delegated to it by Congress in the Organic Act of Guam, 48 U.S.C. Sec 1421(a), the Government of Guam is in essence an instrumentality of the federal government . . ." (citations omitted). The Ninth Circuit confirmed the Sakamoto ruling in a subsequent case of Ngiraingas v. Sanchez, 858 F. 2d 1368 (9th Cir. 1988), aff'd. 495 U.S.____, 109 L Ed 2d 163, 110 S Ct 1737 (1990), where the court

held that "Because we are bound by Sakamoto's instructions that Guam is a 'creation of Congress' and no more than an 'instrumentality of the federal government' 764 F. 2d 1286, we conclude that Guam is not a 'person' chargeable with violating territorial laws under Section 1983." At 1371, 1372. The Ninth Circuit further stated:

> "we held above that the government is in all respects an instrumentality of the federal government and therefore not a person for the purposes of Section 1983. Ibid, at 1372. (Emphasis added)"

This court affirmed the Ngiraingas decision that neither the Territory of Guam nor its officers acting in their official capacities are "persons" under Sec. 1983. Ngiraingas, supra, 109 L Ed. 2d at 174.

In the instant case, the Ninth Circuit ruled that while Guam should be

viewed as a Federal instrumentality for some purposes, Ngiraingas, supra, Sakamoto, supra, the court also reorganized that the designation of an organization as a federal instrumentality is not dispositive as to whether the organization is a federal agency for purposes of FRAP Rule 4(a). citing Hoag Ranches v. Stockton Products Credit Association (In re Hoag Ranches) 846 F.2d 1225, 1227-28 (9th Cir. 1988) and Diaz v. Trust Territory of the Pacific Islands, 876 F.2d 1401, 1404, 1405 (9th cir. 1989).

In Diaz, the Court considered six factors to be relevant in holding that the Trust Territory of the Mariana Islands was a federal agency for purposes of FRAP Rule 4(a). (Appendix A). Consideration of those factors compelled the court to reach an opposite conclusion in the case at bar, reasoning that Guam's executive is elected

by its citizens (48 U.S.C. 1422, 1422(a)); Guam collects a territorial income tax to finance itself, 48 U.S.C. 1421h, 1421i; it is included under the definition of "state" in several federal statutes, and is thus not treated like an arm of the federal government in that respect (42 U.S.C. 1301, 8802); and finally, there is no federal involvement in Guam's litigation decision-making process.

It is quite evident from the foregoing that Guam as an unincorporated territory is sometimes treated like other territories, sometimes like a state, and sometimes even like a foreign country * See, Leibowitz, The Applicability of Federal Law to Guam. 16 Va. J. L. Int'l. 44, 45. (1975). This court has already affirmed the Ninth Circuit's decision re Ngiraingas, supra, that Guam's not a person for purposes of Sec. 1983. Blas

asserts that it is necessary for this Court to also decide that Guam is an agency of the federal government for all purposes, including for purposes of FRAP Rule 4(a).

(II)

If Guam Is An Agency or Instrumentality For Some Purposes Only, Should It be Recognized As An Agency or Instrumentality In Suits Involving Such Agencies or Instrumentalities Under FRAP Rule 4(a)?

The Territory of Guam was ceded to the United States in accordance with the Treaty of Peace between the United States and Spain as signed in Paris on December 10, 1898, and proclaimed on April 11, 1899. 48 U.S.C. Sec 1421. The United States Navy administered Guam's affairs from 1898 to 1950 (except during the Japanese occupation, December 1941 to July 1944). The Organic Act of Guam was enacted in 1950 declaring Guam to be an

unincorporated territory of the United States, the governmental control of which is held at the federal level.

48 U.S.C. Sec. 1421(a) states pertinent parts:

> ". . . The government of Guam shall have the powers set forth in this Act. . . . The government of Guam shall consist of three branches, executive, legislative and judicial, and its relations with the Federal Government in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of Interior."

This grant of authority is restrictive rather than plenary; See, National Bank v. County of Yankton, 101 US 129, 133 (1879) and Guam has no power to act in the absence of a specific authorization from Congress. See, Snow v.

United States, 85 US (18 Wall) 317, 320 (1873).

Because the Government of Guam shall have the powers as set forth in the Organic Act only and since its relations with the Federal government in all matters shall be under the administrative supervision of the Secretary of Interior, if not the program responsibility of any other Federal department or agency, Guam is no more than an agency of the federal government. In Sakamoto, supra, and Ngiraingas, supra, the Ninth Circuit ruled to that effect. However, in the instant case, the Ninth Circuit held that it is not an agency of the federal government as that term is contemplated under FRAP Rule 4(a). Blas asserts that since Guam is merely a creation of a federal statute and under the total control of Congress (See, E.g., 48 U.S.C. Sec. 1423i) there is no

reason why Guam should not be accorded the same status as the agencies contemplated under FRAP Rule 4(a).

Guam marches to the beat of the federal drum and as an agency, its authority to administer itself and to set policy is derived from, and circumscribed by Congress. Though Guam may be like a municipality or state than a run-of-the-mill federal agency, Guam as a creation of the Federal government stands in sharp contrast to "bodies politic" as that phrase is normally understood. See, Leibowitz, 16 Va. J. Int'l. at 35. Guam's total lack of autonomy possessed by states and commonwealths within the federal system is exemplified by but not limited to the following powers vested in the federal government, which powers are being exercised on a regular basis.

1. President's authority to designate and maintain naval and military reservations (48 U.S.C.S. Sec. 1421k);

2. Secretary of Agriculture's uninhibited use of Guam's agencies, facilities and employees toward fire control, watershed protection and reforestation (48 U.S.C.S. Sec. 1421o) and allocation of federal funds to accomplish same (48 U.S.C.S. Sec. 1421p);

3. Although Guam's Governor is elected by Guam's residents, he is responsible for the execution of not only Guam's laws but the laws of the United States and, additionally, must take an annual report of all the transactions of Guam's

government directly to the Secretary of the Interior (48 U.S.C.S. Sec 1422) (emphasis added);

4. The Secretary of Interior appoints Guam's government comptroller, which comptroller is under the general supervision of the Secretary of the Interior and his salary is paid from funds authorized to be appropriated to the Department of the Interior (48 U.S.C.S. Sec 1422d;

5. The federally appointed government comptroller audits, reviews, and recommends adjudication of claims pertaining to the Guam's revenue and receipts, as well as all expenditures of funds and

property pertaining to the Government of Guam and reports all findings directly to the Secretary of the Interior (48 U.S.C.S. Sec. 1422d;

6. The power of Guam's legislature and Guam's ability to borrow money fall under the direct supervision of the federal government's Secretary of Interior, who may guarantee payment on bonds or other obligations as he deems appropriate (48 U.S.C.S. Sec. 1423a);

7. The power of Guam's legislature to pass laws is subject to **censure** and **annulment** by the Congress of the United States (48 U.S.C.S. Sec 1423i); and

The Territory of Guam's government is not an independent entity. It has not been raised to the level of a commonwealth as has Puerto Rico. The Territory of Guam does not have a constitution. It is a unique and unincorporated territory of the United States. The people of Guam do not have the rights accorded all other United States citizens except those limited rights contained in the Organic Act.

The people of Guam are not sovereign, nor does the Government of Guam have a sovereignty which flows from its people through a constitution. Rather, the Congress of the United States has created the Government of Guam as a limited supervisory entity.

Also, the additional elements of the Organic Act have **never** been fully implemented by the Executive Branch. Material to the instant controversy is the

fact that the Executive Branch has ignored the Congressional mandate contained in the Organic Act, which requires the federal military authorities to relinquish the military-controlled civil plants and activities located within the Territory of Guam, e.g. Fena Dam Reservoir, all utilities (including electrical generation plants), Maina well, etc. These civil plants have not been relinquished and are the topic of heated debate in the self-determination talks currently taking place between the federal government and the people of Guam.

Defendants are strictly controlled at the federal level of the United States government and, therefore, are federal instrumentalities within the purview of the agencies contemplated by Rule 4(a).

In Diaz, supra, the Ninth Circuit considered six factors to be relevant

whether the government of the Trust Territory of the Mariana Islands was a federal agency for purposes of FRAP Rule 4(a)

> "... (1) the extent to which the entity at issue performed a governmental function; (2) the scope of the federal government's involvement in the management of that entity; (3) whether the entity's operations were financed by the federal government; (4) proprietary interests of persons other than the federal government; (5) whether the entity is treated as an arm of the federal government in federal statutes; and (6) whether the entity is treated as an arm of the federal government under the Federal Tort Claims Act."

Addressing the above factors, Blas contends:

(1) The government of Guam performs governmental functions in the Territory of Guam. 48 U.S.C. Sec. 1421a; and for the United States, i.e., The Secretary of Treasury has delegated to the government of guam the authority to administer United

States customs in Guam. Barusch V. Calvo, 685 F.2d 1199, 1201. (9th Cir. 1982).

(2) Congress may annul any act of the Guam legislature. 48U.S.C. Sec. 1423i; the Government of Guam is subject to audit by the Inspector General, Department of Interior. 48 U.S.C. Sec. 1422d; the President has the authority to designate and maintain Naval and Military reservations in Guam. 48 U.S.C. Sec. 1421k.; the Governor of Guam prepares & submit to the Congress & the Secretary of Interior an annual comprehensive report and is responsible for the faithful execution of the laws of Guam and the laws of the United States applicable to Guam. 48 U.S.C. Sec. 1422.

(3) The Government of Guam's operations are indirectly financed by the federal government. The enactment of section 31 of the Organic Act (48 U.S.C.

Sec. 1421;) by the United States Congress of the territorial income tax was done primarily to relieve the United States Treasury of the necessity of making direct appropriations; Congress only delegated the collection and enforcement functions to the Government of Guam, but Guam itself is powerless to vary the terms of the federal income tax laws as applied to Guam, except as permitted by Congress. Bank of America; National Trust & Savings Association V. Chaco, 539 F.2d 1226-1228 (9th Cir. 1976); As safeguard to this appropriation, the Government of Guam is subject to audit by the Inspector General of the Department of Interior. 48 U.S.C. 1422d.

The Guam Territorial income tax is not a tax imposed by Guam for purposes of 12 U.S.C. Sec. 548. Chaco, supra at 1228.

For the fiscal year 1989 about 12.8% or $47,676,051.00 was received by the Government of Guam directly from the federal government. (Aflague Affidavit, Appendix Q)

(4) There are no persons who have proprietary interest in the Government of Guam, except the federal government. The jurisdiction and authority of the United States over a territory like Guam is paramount. Grafton v. United States, 206 US 333, 354, 51 L Ed 1084, 27 S Ct 749 (1907); Congress has entire dominion and sovereignty and full legislature power over Territories. (Simms v. Simms, 175 U.S. 162, 168. 44 L Ed 115, 20 S Ct 58 (1899).

(5) The Government of Guam is treated as an arm of the federal government in federal statutes. Congress has delegated the collection and

enforcement of income tax laws of the federal government to the Government of Guam. 48 U.S.C. Sec. 1421; Chaco, Supra. The Government of Guam is responsible for the faithful execution of the laws of Guam and the laws of the United States applicable to Guam. 48 U.S.C. Sec. 1422. The Plant Quarantine Act is applicable to Guam. 7 C.F.R. Sec. 319.37-27 (1981). A Memorandum of Understanding between Guam's Department of Agriculture & the United States Department of Agriculture delegates to Guamanian officials authority to conduct any necessary agriculture inspections. Barusch v. Calvo, supra, footnote 2, at 1201. The Secretary of the Treasury has delegated to the Government of Guam the authority to administer United States customs in Guam. Ibid, at 1201.

(6) Though the government of Guam may not be treated as an arm of the federal

government under the Federal Tort Claims Act, it has been treated as an arm of the federal government in many other respect as shown above. It must be noted that the Ninth Circuit in Diaz, supra is silent as to whether all the above six factors should be present in determining whether an entity is an agency of the United States.

CONCLUSION

Guam is an unincorporated territory of the United States enjoying only such power as may be delegated by Congress in the Organic Act. As such it is like an instrumentality or agency of the federal government; much like a federal department or administrative agency. Like an agency it may administer its own affairs, draft laws of general applicability and even create an entire infrastructure of government. But, as an agency, its authority to administer itself is derived from and circumscribed by Congress.

This Court has not yet ruled, and should rule as to whether Guam is an agency of the federal government for the purposes of FRAP Rule 4(a). This Court's ruling may also help clarify the treatment sometimes accorded Guam as a foreign country, as one of the states, like other

territories and sometimes as a quite unique entity.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully re-submitted this 21st day of January, 1992.

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